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IN THE

# Supreme Court of the United States

ILLINOIS TOOL WORKS, INC. AND TRIDENT, INC.,

*Petitioners,*

*v.*

INDEPENDENT INK, INC.,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## ~~MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* AND~~ BRIEF OF *AMICUS CURIAE* BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA — PATENT, TRADEMARK & COPYRIGHT SECTION IN SUPPORT OF PETITIONER

David W. Long*
Vandana Koelsch
HOWREY LLP
1299 Pennsylvania Avenue
Washington, D.C. 20004
Telephone: 202-383-7073

*Attorneys for Amicus Curiae Bar Association of the District of Columbia — Patent, Trademark & Copyright Section*
**Counsel of Record*

Blair Elizabeth Taylor, Ph.D.
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 344-4639

Lynn E. Eccleston
THE ECCLESTON LAW FIRM
1101 Pennsylvania Avenue,
N.W., Suite 600
Washington, D.C. 20004
Telephone: (202) 756-7723

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## MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA — PATENT, TRADEMARK & COPYRIGHT SECTION IN SUPPORT OF PETITIONERS

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Pursuant to this Court's Rule 37.3(a), the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia ("BADC") respectfully moves for leave to file the attached brief in support of the Petitioners in this case. The written consent of Petitioners was obtained from counsel of record. The consent of Respondent was sought, but counsel of record did not respond to the BADC's request.

The BADC is one of the senior-most intellectual property bar associations in the United States, having a

membership drawn from government, industry and private practice. The BADC and its members have a substantial interest in the adjudication of significant issues defining our patent laws, and the BADC only submits *amicus curiae* briefs when issues of such magnitude arise. The case at bar presents an issue in which Supreme Court precedent has not been uniform, creating discrepancies that have significantly impacted the interpretation of our patent laws. The BADC seeks to assist the Court by directing its attention to apparent inconsistencies in its precedent regarding the definition of letters patent as monopolies.

Accordingly, the BADC respectfully requests that the Court grant this motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

Dated: August 4, 2005


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| David W. Long*<br>Vandana Koelsch<br>HOWREY L.L.P.<br>1299 Pennsylvania Avenue, N.W.<br>Washington, D.C. 20004<br>Telephone: (202) 383-7073<br><br>**Counsel of Record*<br><br>*Attorneys for Amicus Curiae Bar Association of the District of Columbia — Patent, Trademark & Copyright Section* | Blair Elizabeth Taylor, Ph.D.<br>Chair, Amicus Committee<br>Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia<br>VENABLE LLP<br>575 7th Street, N.W.<br>Washington, D.C. 20004<br>Telephone: (202) 344-4639<br><br>Lynn E. Eccleston<br>THE ECCLESTON LAW FIRM<br>1101 Pennsylvania Avenue, N.W., Suite 600<br>Washington, D.C. 20004<br>Telephone: (202) 756-7723 |




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## BRIEF FOR *AMICUS CURIAE* BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA — PATENT, TRADEMARK & COPYRIGHT SECTION IN SUPPORT OF PETITIONERS

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## THE INTEREST OF *AMICUS CURIAE*

The Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia ("BADC") respectfully submits this brief as *amicus curiae* in support of Petitioners.[1]

The BADC is one of the oldest and most senior intellectual property bar associations in the United States uniquely situated in the nation's capital having a broad cross-section of members from government, industry and private practice, with members often representing both the patent owner and the accused infringer. The BADC functions in an entirely *pro bono* fashion in its efforts to aid the advancement and creation of a uniform body of case law to guide the patent community. The BADC has no stake in the parties to this litigation or interest in the result in the case, other than an interest in seeking correct and consistent interpretation of intellectual property law.

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[1] This *amicus curiae* brief is presented by the Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia under Supreme Court Rule 37.3(a). A Motion for leave to file this brief is submitted herewith. In accordance with Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief. Only this *amicus curiae* made a monetary contribution to the preparation and submission of this brief. Counsel for *amicus curiae* prepared this brief on a *pro bono* basis.

## STATEMENT OF THE CASE

Respondent Independent Ink, Inc. ("Independent Ink") filed suit seeking a declaratory judgment of non-infringement and invalidity of a printhead patent owned by Petitioners Illinois Tool Works, Inc. and Trident, Inc. (collectively "ITW"). Independent Ink later amended its complaint to allege that ITW violated Sections 1 and 2 of the Sherman Act by using its patent in an illegal tying arrangement.

The district court granted summary judgment in favor of ITW on both Section 1 and 2 Sherman Act claims. The court found that Independent Ink failed to show that ITW held market power in the relevant market for its patented printhead technology. But the district court sidestepped Supreme Court precedent that presumes market power exists in tying arrangements involving a tying product covered by a patent. On appeal, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") reversed the district court's decision, holding that the district court was bound to follow valid Supreme Court precedent. This Court granted ITW's requests to review the Federal Circuit's decision.



## SUMMARY OF THE ARGUMENT

The presumption of market power emanating from the mere grant of a patent should be abrogated, because it is not legally or practically aligned with contemporary patent and antitrust laws.

The misnomer that market power can be presumed solely from a patent arises in part from semantics. A patent grants the owner over a limited period of time the right to exclude others from selling products that embody the patented invention, but does not grant the owner the right to sell the product (*e.g.*, product features may be covered by someone else's patent) or ensure success in doing so (*e.g.*, someone else may sell an alternative, competing product). However, this Court loosely has referred to patents as granting a legal "monopoly," which term has significant meaning and connotations in antitrust law. The mischief that results goes beyond semantics by creating a general misperception that a patent in and of itself creates an antitrust-type of "monopoly" that is somehow exempt from the antitrust laws. The Court should clarify that patents are not *per se* monopolies under the antitrust laws.

## ARGUMENT

### I. A MONOPOLY REQUIRES THE ABILITY TO CONTROL A MARKET

To understand why characterizing a patent as a form of monopoly produces a Janus-like result, one should first consider what constitutes a monopoly under the antitrust laws.

#### A. Monopolies Are Prohibited Under the Sherman Act

Congress passed the Sherman Act in 1890 in response to the inordinate consolidation of power in several industrial markets (now codified at 15 U.S.C. § 1 *et seq.*) The Act sought to prevent anticompetitive behavior from destroying free market competition and injuring consumers. Senator John Sherman sponsored the Act to make illegal certain arrangements formed to "prevent full and free competition," and that would "advance the cost to the consumer." See THOMAS MORGAN, MODERN ANTITRUST LAW AND ITS ORIGINS at 25-30 (2d ed. 2001). What ultimately emerged was "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." Id. at 30. Section 1 of this Act prohibits restraint of trade or commerce through contracts or combinations, essentially as Senator Sherman envisioned. Section 2, however, was added by amendment, and forbids monopolization or attempts to monopolize any part of trade or commerce. Id. at 28-30.

Section 2 has been read in concert with Section 1 as establishing a nexus between the types of acts forbidden and the objective of avoiding restraint of trade. Tying arrangements, such as those alleged in this case, fall within Sherman Section 1. See Indep. Ink, Inc. v. Ill. Tool Works,



Inc., 396 F.3d 1342, 1342-47 (Fed. Cir. 2005); see also Int'l Salt Co. v. United States, 332 U.S. 392 (1947).

#### B. A Monopoly Is an Unreasonable Restraint of Trade

"The term monopoly connotes the giving of an exclusive privilege for buying, selling, working or using a thing which the public freely enjoyed prior to the grant. Thus, a monopoly takes something from the people." United States v. Dubilier Condenser Corp., 289 U.S. 178, 186 (1933). Thus, under antitrust law, a monopoly precludes competitive access to an item of commerce previously in the public domain.

This Court has deemed tying arrangements to be unreasonable "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." N. Pac. Ry Co. v. United States, 356 U.S. 1, 11 (1958). The sin of a tie-in arrangement is the "use of economic power in one market to restrict competition on the merits in another, regardless of whether the power takes the form of a monopoly or not." Id.

This Court noted in Northern Pacific "[a]lthough [Sherman Act § 1] is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." Northern Pacific, 356 U.S. at 4-5 (citations omitted). Accordingly, a monopoly is considered to be an unreasonable restraint of trade that offends our public policy notions of protecting market competition and the American consumer.

In order to be a monopolist, an actor must have the ability to control the relevant market for a given product. To this end, the Supreme Court has described a monopoly as an individual's or group's "complete dominion of something already existent." United States v. Line Material Co., 333 U.S. 287, 338 (1948). When interpreting Section 2 of the Sherman Act, this Court has noted that dominion over a market in a monopolistic sense requires the ability to control pricing and competition, which is determined in part by the degree of elasticity of the market. United States v. E.I. DuPont De Nemours & Co., 351 U.S. 377 (1956). Cross elasticity, the nature of the product at issue, and geographic limitations are a few of the factors considered when determining the scope of the market allegedly subject to monopoly. Id.

In sum, the term "monopoly" has specific meaning and connotation in antitrust law that go far beyond the mere right to exclude someone from selling a particular type of product with certain features.

## II. MODERN PATENTS CONFER A RIGHT TO EXCLUDE, NOT A MONOPOLY

### A. U.S. Patent Laws Evolved from Early European Notions of Monopolies

American patent law traces its origins, at least in part, to the evolution of British intellectual property law. See, e.g., MARTIN ADELMAN ET AL., CASES AND MATERIALS ON PATENT LAW 9-17 (1st ed. 1998) (discussing Venetian, Tyrolean, and British influences on the development of the U.S. patent system). Early British patent grants took two forms. One form was conferred on inventors to induce the genesis of technological advancements, which is akin to the modern patent right. The other form was bestowed by the



monarch on cronies to control the trade of an otherwise publicly available commodity to the benefit of only the patent recipient, which is akin to an antitrust-type monopoly. Justice Burton's dissent in Line Material explained these two prior forms of British patents:

> A patent to an inventor took nothing from the public which the public or the inventor's competitor's already had. By hypothesis, it dealt with a new asset available to civilization only through its inventor. The royal patent served to encourage the inventor to disclose his invention. By granting to the inventor the right to exclude all others from making, using or selling the invention for a limited time, it was felt that the public was well served by the invention's disclosure, its early availability under the patent and its later general availability to everyone. This procedure was popular. On the other hand, royal patents securing exclusive rights to private parties to conduct profitable enterprises to the exclusion of existing or available competitors were issued to show royal favor or to secure funds at the expense of the public. Such patents became highly unpopular.

Line Material Co. at 329-30. The monopoly-type royal patents, geared toward removal of an item of commerce from the public domain, were deemed invalid in The Case of Monopolies, Darcy v. Allein, 6 Co. Rep. 84b, [K.B.] 159 (1602). This judicial prohibition of monopoly-type patents was codified into English law by the Statute of Monopolies in 1624 (21 Jac. I, c.3, § I.). What survived was the inventor-type patent that rewarded an inventor with a *quid pro quo* of limited exclusivity in exchange for contributing

something new and useful to society. This concept has been molded over time into our contemporary patent system that drives the engines of innovation fueling our economy.

### B. Patent Rights Are Not Exceptions to Antitrust Law

Our current patent laws provide for a patent grant that confers on the patentee "'the right to exclude others from making, using, offering for sale, selling, or importing the patented invention' in exchange for full disclosure of an invention." Markman v. Westview Instruments, Inc., 517 U.S. 370, 372 (1996) (citation omitted).

Although granting the right to exclude others from practicing a patented invention, nowhere does our patent statute confer the right to unreasonably restrain trade and monopolize a relevant market. Rather, as aptly summarized by the Federal Circuit, "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws." In re Indep. Serv. Orgs. Antitrust Litigation, 203 F.3d 1322, 1325 (Fed. Cir. 2000). Indeed, Justice Burton shared this view, stating:

> The constitutional and long standing statutory approval of the exclusive rights of an inventor to make, use and sell products of his invention for a limited time was ample guaranty that the Sherman Act did not directly or impliedly repeal such approval. The prohibition of unreasonable restraints of trade and the approval of exclusive rights of inventors to their inventions for limited periods of time continued to exist together. This was nothing new. As long as inventors kept within their statutory exclusive rights, they were not



> engaging in unreasonable restraints of trade violating the Sherman Act.

Line Material, 333 U.S. at 341. Thus, our patent laws historically have permitted a patentee to exclude others from benefiting from his inventive efforts for a limited period of time. That right to exclude exists, however, separate from our antitrust law and its definitions of monopoly and monopoly power.

Nonetheless, throughout the years, patents erroneously have been called "legal monopolies," a misnomer that has caused confusion and the improper inference that a patent owner has *de facto* control over a given market. Realistically, an entity cannot monopolize a relevant market without having control over that domain. Using the antitrust term of art "monopoly" in connection with patent rights inadvertently infers that market control is inherent in the patent grant. No other sector of anti-competition law permits an inference of the ability to control market supplies, increase prices, and otherwise harm consumer interests. Rather, confirmation of other types of monopolies requires specific inquiry into the scope of the relevant market and its attendant characteristics. See United States Steel Co. v. Fortner Enters., Inc., 429 U.S. 610, 620 (1977). The same inquiry is required to fairly evaluate whether a patentee has strayed outside the metes and bounds of his patent rights in an anti-competitive manner.

This misnomer of defining a patent to be a "legal monopoly" may trace its origins to the English Statute of Monopolies, discussed above. Adherence to this centuries old statutory language perpetuates the misconception of the modern patent grant as a form of contemporary antitrust monopoly. Regardless of how the practice started, continued

reference to patents as "monopolies" erroneously blurs the lines between patent and antitrust laws.

### C. Inconsistent Precedent Intermingles Patent and Antitrust Terms

Many sources employ contradictory language when describing the interface between the patent and antitrust laws. Unfortunately, this Court appears to be one of the culprits, based on some precedent that has labeled patents as "legal monopolies."

Many decisions of this Court have been careful to distinguish the patent grant from monopolies. Prior to the passage of the Sherman Act, the Court clearly distinguished between patent rights and anti-competitive monopolies.

> Letters patent are not to be regarded as monopolies . . . but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them, as such inventors, for the limited term therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as a matter of compensation to the inventors for their labor, toil and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress.

Seymour v. Osborne, 78 U.S. 516 (1871). The Seymour court invoked language separating patent grants from the concepts that were eventually codified in our antitrust laws.



Seymour was later cited for the principle that "[t]hough often so characterized, a patent is not, accurately speaking, a monopoly, for it is not created by the executive authority at the expense and to the prejudice of all the community except the grantee of the patent." Line Material at 339.

The Court apparently still embraces the teachings of Seymour, citing the above-quoted passage in a more recent patent case. See Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 63-64 (1998). In a similar vein, the Court stated in an intervening case:

> Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight.

Northern Pacific, U.S. 356 at 10 n.8. In this instance, the Court recognized that patents do not always confer the economic power adequate to control market interplay, meaning a hallmark of a monopoly in the antitrust sense does not automatically attach to the patent grant.

Likewise, Justice O'Connor explained that patents do not automatically confer market power:

> A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power in any relevant sense if

there are close substitutes for the patented product.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 28 n.7 (1984) (citation omitted). The Court has also instructed that a patentee's ability to suppress a competitor's activities "must be derived from its patent grant, and thus from the patent statute." Deepsouth Packaging Co., Inc. v. Laitram Corp., 406 U.S. 518, 526 (1972). Taken together, these Supreme Court cases have interpreted our patent laws to mean that a patent grant is not a monopoly as defined in antitrust precedent.

This theme has not been a consistent thread in our patent precedent. In one of the seminal cases in patent law, for example, the Supreme Court stated:

> A patent by its very nature is affected with a public interest . . . [It] is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that *patent monopolies* spring from backgrounds free from fraud or other inequitable conduct and that *such monopolies* are kept within their legitimate scope.

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (emphasis added). In Bonito Boats, the Court cautioned that "Congress may not create *patent monopolies* of unlimited duration." Bonito Boats, Inc. v. Thundercraft Boats, Inc., 489 U.S. 141, 146 (1989) (emphasis added). More recently, the Court opined that "[a]lthough recognizing the patent system's desirable



stimulus to invention, we have also viewed the patent as a monopoly which, although sanctioned by law, has the economic consequences attending other monopolies." Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 101 (1993) (citing Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952)).

These references to patents as monopolies are at odds with the Court's teachings to the contrary. Notably, the Pfaff Court cited a circuit court decision as being "consistent" with Seymour , despite the fact that the circuit court decision refers to patent protection as a "monopoly." See Pfaff, 525 U.S. at 64. More recently, the Court discussed the patent grant in terms of being a "monopoly" and a "monopoly of knowledge," as well as an "exclusive right." Eldred v. Ashcroft, 537 U.S. 186, 216 (2003). It is unclear how a "monopoly of knowledge" would assure control of a relevant market.

Reference to patents as "monopolies" is troubling legally, and practically. Absent market power, as noted in Northern Pacific, and Jefferson Parish, a patentee does not possess the ability to impose the "economic consequences" associated with a true monopoly as per Cardinal Chemical and Walker Process. The danger of cloaking patent concepts in antitrust lingo rests in the inability of those not savvy in the complexities of patent law, such as juries, to understand the important nuances distinguishing patent privileges from unreasonable restraints of trade.

Federal Circuit precedent has helped clarify how a patentee's right to exclude differs from an antitrust monopoly. As sagely explained by Judge Rich over twenty years ago:

> The patent system, which antedated the Sherman Act by a century, is not an "exception" to the antitrust laws, and patent rights are not *legal monopolies* in the antitrust sense of that word. Accordingly, if a patent is held to have been obtained illegally, it is not properly said, *ipso facto*, that it was all along an *illegal monopoly* and, thus that its procurement and attempted enforcement was a *per se* violation of the antitrust laws. A holding that monopoly analysis should end in favor of liability on a determination of fraud, without more, would signal a fundamental misunderstanding of the substance and purposes of both the patent and the antitrust laws.

Am. Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1367 (Fed. Cir. 1984). The Federal Circuit reiterated this view by noting "[a] patent alone does not demonstrate market power," meaning patent grants *per se* lack a component of the antitrust concept of a monopoly. Indep. Serv. Orgs., 203 F.3d at 1325 (citations omitted).

The above-cited Federal Circuit language, while clearly not binding on the Supreme Court, provides an accurate and understandable compass for navigating the contours of our patent and antitrust laws. This language is consistent with Supreme Court guidance set forth before and after the passage of the Sherman Act. Clarification by this Court that a patent grant is a right to exclude competitors from employing a claimed invention, as opposed to a *de facto* monopoly over the market in which the claimed invention resides, would greatly advance the ability of patent practitioners and judges to adjudicate issues straddling the fine line between patent and antitrust laws.



## CONCLUSION

American patent and antitrust laws work in tandem to foster innovation, while protecting the public from the harms of undue restraints of trade. Patents confer a bundle of rights to a patentee, including the right to exclude others from employing the claimed invention during the patent term. A patent, however, is not a form of "legally granted monopoly." To the contrary, a monopoly is by definition an *undue or unreasonable* restraint of trade under our antitrust laws. There is nothing unreasonable about the *quid pro quo* provided to inventors under our patent laws. The BADC respectfully requests that the Supreme Court take this opportunity to clarify this issue confounding patent practice.

Respectfully submitted,

Dated: August 4, 2005


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| David W. Long*<br>Vandana Koelsch<br>HOWREY L.L.P.<br>1299 Pennsylvania Avenue, N.W.<br>Washington, D.C. 20004<br>Telephone: (202) 383-7073<br><br>*Counsel of Record<br><br>*Attorneys for Amicus Curiae Bar Association of the District of Columbia — Patent, Trademark & Copyright Section* | Blair Elizabeth Taylor, Ph.D.<br>Chair, Amicus Committee<br>Patent, Trademark & Copyright Section of the Bar Association of the District of Columbia<br>VENABLE LLP<br>575 7th Street, N.W.<br>Washington, D.C. 20004<br>Telephone: (202) 344-4639<br><br>Lynn E. Eccleston<br>THE ECCLESTON LAW FIRM<br>1101 Pennsylvania Avenue, N.W., Suite 600<br>Washington, D.C. 20004<br>Telephone: (202) 756-7723 |